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No. 79-900

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FEDERAL TRADE COMMISSION, *et al.*,
Petitioners,

v.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceedings in support of respondent. Consent to the filing of this brief has been obtained from counsel for the respondent, Standard Oil Company of California. However, consent has been refused by Wade H. McCree, Jr., counsel for the Federal Trade Commission and the United States, petitioners.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for

the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following recent cases: *Williams v. Zbaraz,* Nos. 79-4, 79-5, 79-491 (U.S., filed July 2, 1979); *Consolidated Edison Co. of New York v. Public Service Commission of State of New York,* No. 79-134 (U.S., filed July 27, 1979); *United Steelworkers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); and *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827 (U.S., filed Nov. 26, 1979).

WLF seeks to advance the interests of not only companies, but of all persons to be free of politically motivated legal harassment by instrumentalities of the federal government. WLF therefore finds that supporting the respondent in the instant case is within the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. None

of the litigating parties is primarily focusing upon the broader question of the power of administrative agencies to issue complaints without finding substantial bases for their actions. WLF's sole concern in this case is to support the right of businesses to function freely within the free enterprise structure and to be responsible to the government only in cases of actual wrongdoing.

Regardless of the political or economic predilections of regulators, permitting external and irrelevant political pressures to influence the initiation of agency proceedings would establish a dangerous precedent. WLF seeks to eliminate such *ex parte* factors from all levels of the agency decision-making process. The integrity of the administrative process and the public's perception of its governmental agencies and personnel calls for the earliest resolution as possible to determine whether enforcement proceedings have been lawfully initiated.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION, INC. 1

STATEMENT OF THE CASE 3

ARGUMENT:

I. The Issuance Of An Administrative Complaint Is "Agency Action" Within The Meaning Of 5 U.S.C. § 701 3

II. The Integrity Of The Administrative Process Requires Immediate Judicial Review To Determine Whether An Agency Had Reason To Believe A Violation Occurred In Light Of Substantial Aliegations To The Contrary 5

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 5

Association of National Advertisers, Inc. v. FTC, 48 U.S.L.W. 2433 (D.C. Cir. 1979), *cert. denied*, 48 U.S.L.W. 3820 (U.S. June 17, 1980) 11

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 10

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 9, 10

DeVito v. Shultz, 300 F. Supp. 381 (D.D.C. 1969) 10

District of Columbia Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972) 11

Dunlop v. Bachowski, 421 U.S. 560 (1975) 4

FTC v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951) 6

FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967) 10

Page

Jewell Cos. v. FTC, 432 F.2d 1155 (7th Cir. 1970) 11

KFC National Management Corp. v. NLRB, 497 F.2d 298 (2d Cir. 1974) 9

Marshall v. Jerrico, ___ U.S. ___, 48 U.S.L.W. 4485 (1980) 4, 11

Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir.), *vacated on other grounds*, 404 U.S. 403 (1972) 10

Moog Industries v. FTC, 355 U.S. 411, *rehearing denied*, 355 U.S. 968, 356 U.S. 905 (1958) 10

Peoples v. United States Department of Agriculture, 427 F.2d 561 (D.C. Cir. 1970) 10

Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966) 11

Singer Sewing Machine Co. v. NLRB, 329 F.2d 200 (4th Cir. 1964) 10

Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919) 10

Standard Oil Co. of California v. FTC, 596 F.2d 1381 (9th Cir. 1979) 10

United States v. Falk, 479 F.2d 616 (7th Cir. 1973) 10

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) 11

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1976):

§ 551(11)(c) 4

§ 551(13) 4

§ 702 3

§ 704 8

§ 706 10

Page

Federal Trade Commission Act (1976), § 5b, 15 U.S.C. § 45b 5

2 U.S.C. § 437g 8

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The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon the broader question of the power of administrative agencies to issue complaints without finding substantial bases for their actions. WLF's sole concern in this case is to support the right of businesses to function freely within the free enterprise structure and to be responsible to the government only in cases of actual wrongdoing.

Regardless of the political or economic predilections of regulators, agency actions affecting outside parties should have rational purposes and some facts to support particular decisions. Permitting external political pressures to influence agency proceedings would establish a dangerous precedent. WLF seeks to eliminate such *ex parte* factors from agency decision making.

STATEMENT OF THE CASE

This case has woven a tortuous path through administrative and judicial proceedings for most of a decade. In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the facts by the Ninth Circuit in the opinion below (J.A. 54-56).

ARGUMENT

I.

THE ISSUANCE OF AN ADMINISTRATIVE COMPLAINT IS "AGENCY ACTION" WITHIN THE MEANING OF 5 U.S.C. § 701

The Court of Appeals below correctly concluded that the issuance of the administrative complaint by the Federal Trade Commission (FTC) against the Standard Oil Company of California (SOCAL) was "agency action" within the meaning of 5 U.S.C. §§ 551(13) and 702. (J.A. 56-57). The issuance of an administrative complaint triggers the adjudicative process at the agency level entailing costly legal expenses and resources. The decision by the FTC to issue such a complaint and the ensuing proceedings impose "significant burdens" on SOCAL, even if the company should ultimately prevail at the conclusion of those proceedings or after judicial

review of an adverse administrative order. *See Marshall v. Jerrico*, ___ U.S. ___, 48 U.S.L.W. 4485, 4488 (1980).

The petitioners argue that the issuance of an administrative complaint is not "agency action" because it "does not require the respondent to do or refrain from doing anything save respond." (Pet. Brief at 19). Yet, the nature of the response required, the penalties for failure to do so, and the ensuing administrative proceedings impose an enormous burden and cost not only on the respondent, but on the agency, and ultimately, on the taxpayers and consumers as well.

In another respect, *amicus* submits that issuance of the administrative complaint is "agency action" in this case since that issuance was preceded by the FTC's denial of SOCAL's petition filed in January 1974 to dismiss the administrative complaint. The "denial" of "relief" by the agency to a petitioner is also "agency action." 5 U.S.C. §§ 551(13), 551(11)(C).[1]

Finally, if, as petitioners must admit, that the failure to initiate an administrative complaint or prosecution is "agency action" (*Dunlop v. Bachowski*, 421 U.S. 560), *amicus* submits that it follows that a decision to issue a complaint is *a fortiori* "agency action."

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[1] 5 U.S.C. § 551(13) provides:

"[A]gency action includes the whole or part of an agency rule, order, license, sanction, *relief* or the equivalent *or denial thereof*, or failure to act." [Emphasis added.]

5 U.S.C. § 551(11)(C) states that:

" 'relief' includes the whole or a part of an agency—

(C) taking of other action on the application or petition of, and beneficial to, a person."

For any or all of these reasons, the court below correctly concluded that the issuance of the FTC's administrative complaint is "agency action." The only remaining consideration is whether that action is final agency action subject to judicial review or whether it is within the discretion of the agency to prosecute a respondent for any reason, or for no reason at all.

II.

THE INTEGRITY OF THE ADMINISTRATIVE PROCESS REQUIRES IMMEDIATE JUDICIAL REVIEW TO DETERMINE WHETHER AN AGENCY HAD REASON TO BELIEVE A VIOLATION OCCURRED IN LIGHT OF SUBSTANTIAL ALLEGATIONS TO THE CONTRARY

Although it is well recognized that an agency may have a certain amount of prosecutorial discretion in deciding whether or not to initiate enforcement proceedings, the agency must follow the procedures specified by Congress in the agency's organic statute. There is a presumption of judicial review of agency action or inaction. *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967). In this case, the FTC is required by Section 5(b) of the Federal Trade Commission Act to determine first that there is "reason to believe" that a violation of the Act occurred before it may begin its lengthy adjudicative proceedings.[2]

The FTC must demonstrate that its complaint was a consequence of "a justifiable basis for believing, derived

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[2] 15 U.S.C. § 45(b) provides in pertinent part:

Whenever the Commission shall have reason to believe that any . . . corporation has been or is using any unfair method of competition . . . it shall issue and serve upon such . . . corporation a complaint stating the charges. . . .

from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that ". . . [there was a] violation of the Act." *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744, 747-48 (7th Cir. 1951).

Because of the timing of the issuance by the FTC of its administrative complaint and the political circumstances surrounding it (J.A. 54-56), SOCAL claims that the FTC did not make the requisite "reason to believe" determination. As the court below summarized it:

> In short, SOCAL claims that the FTC did not make and, in the circumstances, could not have made the "reason to believe" determination despite a recitation on the face of the FTC complaint that the determination had been made. [J.A. at 59]

Although the FTC complaint number 8934 is dated July 18, 1973 and signed by the Secretary to the FTC, there is no indication whatsoever from the record whether the FTC Commissioners *in fact* deliberated and voted to find "reason to believe" and, if so, the date of such meeting, and the existence of any dissenting votes or absentees at the time of the alleged vote.

Amicus submits that in situations such as those presented in the instant case suggesting impropriety by the agency in issuing its complaint and the failure to find the requisite "reason to believe", the public interest is best served by a impartial judicial determination as to whether or not the agency found "reason to believe" a violation occurred or whether it had none at all, but was merely responding to political pressures. If that issue were not initially resolved, it would cast a pall over the entire adjudicative proceedings, tainting the integrity of the FTC and its personnel. Indeed, even the FTC's

Administrative Law Judge recommended to dismiss the hastily drawn complaint against SOCAL (J.A. 55-56).

It should also be in the interest of the FTC to have this issue resolved at the outset in order to proceed with its adjudicative proceedings in a timely and orderly fashion. *Amicus* believes that if the FTC has properly found "reason to believe" that a respondent has violated antitrust laws, it is in the public interest that adjudicative proceedings should be prompt and appropriate remedies fashioned if antitrust violations are found by the Administrative Law Judge. As it now stands, the FTC has fought this case for nearly a decade on an issue that it could have easily resolved at the beginning, a situation which belies the FTC's purported concern that the reviewability of the existence *vel non* of the requisite "reason to believe" would diminish the effectiveness of the agency's enforcement powers.

The petitioner's suggestion that judicial review of the "reason to believe" determination is available at the end of the administrative proceeding is an empty one. (Pet. Brief at 55). In the first place, if such a review is available, the amount of time to litigate that issue should be approximately the same regardless of whether it is litigated "up front" or at the end of the FTC proceedings. Thus, if the FTC should prevail on that issue, the same amount of time would be tacked on to the entire enforcement proceedings before any cease and desist order would actually take effect. Secondly, *amicus* suggests that the availability of review at the end of the proceedings might well become an academic question. Costly administrative and legal expenses would be saved through an earlier determination by the court as to the legal sufficiency of the complaint. If, as seems probable, the FTC complaint was promulgated without a "reason

to believe" determination, the FTC proceedings could cease at once. As Circuit Judge Tang stated for the court below:

> SOCAL is presently obligated to respond in administrative proceedings that allegedly have been initiated in an unlawful manner. Without review now, the alleged unlawfulness is likely to become insulated from any review. If SOCAL should prevail in the FTC proceedings, the claims raised now would become moot and, therefore, unreviewable.
>
> [J.A. at 61.]

As recognized by the court below, the finality provision, 5 U.S.C. § 704, should be interpreted in a flexible and practical way (J.A. at 60) (cases cited omitted). *Amicus* submits that the Court of Appeals did not err in applying the finality provision in the flexible manner that it did. To foreclose review in these circumstances could possibly foreclose review of other agency actions that initiate enforcement proceedings without complying with the requisite "reason to believe" determination.

For example, the Federal Election Commission must first find "reason to believe" a violation occurred before it can begin its enforcement proceedings. 2 U.S.C. § 437g. This statutory safeguard to the public of unwarranted FEC investigations would be meaningless if the FEC, based upon some political motivation, were able to launch a time-consuming and politically damaging investigation of a candidate or committee without finding "reason to believe." As long as the respondent in such agency proceedings has sufficient reasons to demonstrate that the agency failed to follow statutory prerequisites, an early review should and must be available to the respondent.

Petitioner's basic policy argument is that preliminary reviews would hamstring this and other agencys' enforcement powers. (Pet. Brief at 35, n.21; 47). As noted earlier, the amount of time needed to review the issue in question, whether before or after the agency proceedings, would be the same. Secondly, challenges to the agency's determination of whether it had "reason to believe" should be relatively rare since most agency proceedings are conducted with regularity and with justification so as to not to suggest that the proceedings were unlawfully instituted. Thirdly, any such challenge might be foreclosed if the agency, even amidst controversial cases, made it crystal clear to the respondent the bases and evidence upon which it made a "reason to believe" determination and the actual vote of such determination. Finally, in those rare cases where review is sought, the reviewing court need not probe the mind of the administrators, although that may be justified under certain circumstances. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). Instead, the court need only examine the statement of reasons proffered by the agency and the basic facts allegedly supporting the finding of "reason to believe." At that point, a judge could quickly and easily determine whether the agency found "reason to believe" or not.

In a situation where an agency has been granted discretion by law, its decisions are usually exempt from judicial scrutiny. However, where "there has been a *prima facie* demonstration of impropriety the court will inquire into the administrative process in order to insure that the decision-making was informed, unbiased and personal." *KFC National Management Corp. v. NLRB,* 497 F.2d 298, 305 (2d Cir. 1974), Courts will intervene

to overturn arbitrary and capricious agency decisions.[3]

Agencies have often compared their administrative decisionmaking to "prosecutorial discretion" in criminal proceedings. However, courts will nevertheless review arbitrary agency actions to prevent unfair application of the law.[4] The Supreme Court has recently stressed that "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement

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[3]Section 706 provides that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of *law*, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;

See Standard Oil Co. of Cal. v. FTC, 596 F.2d at 1386; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 413-14; *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 567 (D.C. Cir. 1970); *DeVito v. Shultz*, 300 F. Supp. 381, 382-83 (D.D.C. 1969); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 249-51 (1967); *Singer Sewing Mach. Co. v. NLRB*, 329 F.2d 200, 202 (4th Cir. 1964); *Moog Industries v. FTC*, 355 U.S. 411, 414, *rehearing denied*, 355 U.S. 968, 356 U.S. 905 (1958); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562-63 (1919).

[4]*Medical Comm. for Human Rights v. SEC*, 432 F.2d at 673. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978); *United States v. Falk*, 479 F.2d 616, 618-21 (7th Cir. 1973); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Marshall v. Jerrico,* 48 U.S.L.W. at 4488.

The presence of bias or undue external pressure upon agency decision-makers has been cited by courts as reasons to review and set aside particular administrative actions. For example, in *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231 (D.C. Cir.), *cert. denied,* 405 U.S. 1030 (1972), the Secretary of Transportation was in a position to determine whether federal funds were to be employed to construct a highway bridge over the Potomac River. Several Congressmen publicly declared their opposition to Washington, D.C. subway construction unless the Three Sisters Bridge project received funds. The subsequent decision by Secretary Volpe to build the bridge was invalidated by the Court of Appeals for the D.C. Circuit. The court held that "the Secretary must reach his decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations." *Id.* at 1248. Political pressure by the Attorney General upon the proceedings of the Board of Immigration Appeals was found by the Supreme Court in *United States v. Shaughnessy,* 347 U.S. 260 (1954), as a justification for setting aside agency action.[5]

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[5]*See also Jewel Cos. v. FTC,* 432 F.2d 1155 (7th Cir. 1970), where the Seventh Circuit court found that the reasoning a FTC Commissioner had in voting for the issuance of a complaint could be reviewed immediately without the promulgation of a final agency order. The issue of disqualifying FTC Commissioners for bias is explored in several cases including *Ass'n of Nat'l Advertisers, Inc. v. FTC,* 48 U.S.L.W. 2433 (D.C. Cir. 1979), and *Pillsbury Co. v. FTC,* 354 F.2d 952 (5th Cir. 1966), *cert. denied,* 48 U.S.L.W. 3820 (U.S. June 17, 1980).

Amicus stresses that the instant case reveals a prime example of outside political pressure influencing agency decisionmaking. Senator Jackson asked the FTC, at a time when gasoline shortages first surfaced during peacetime, to fully investigate a complex industry and issue a report within a month. The result of this pressure was a hastily drafted unofficial report. Public pressure increased when the draft was published as a Committee print. It is apparent that the abrupt Commission decision to issue a complaint (shortly after FTC Chairman Engman's statement that the agency investigation should not be rushed) was politically motivated. In its desire to please a Senator and maintain a "tough" public image, the FTC has allowed improper considerations to affect its actions. This abuse of administrative discretion at this critical stage of the administrative proceedings is ripe for a searching judicial review.

CONCLUSION

The Federal Trade Commission may not issue a formal complaint unless it has "reason to believe" that violations of the law have taken place. Although courts will not review the determination by administrative agencies that a violation has occurred, judicial intervention should occur in order to determine whether a reason to believe decision has been made at all in light of serious allegations to the contrary. *Amicus* submits that it is in the public interest for both the respondent and the agency to have this threshold issue resolved at the outset, and, accordingly, urge this Court to affirm the Court of Appeals.

Respectfully submitted,

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